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13

14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA

16 IN RE BANG ENERGY DRINK  
17 MARKETING LITIGATION

Case No. 4:18-cv-05758-JST-RMI  
(Consolidated with 4:18-cv-06300)

**DECLARATION OF MICHAEL D.  
KANACH IN SUPPORT OF  
DEFENDANT'S MOTION FOR RELIEF  
FROM NONDISPOSITIVE PRETRIAL  
ORDER OF MAGISTRATE JUDGE (ECF  
82)**

Complaint filed: September 19, 2018  
Consolidated Class Action Complaint filed:  
October 31, 2019

1 I, Michael D. Kanach, declare as follows:

2 1. I am an attorney licensed to practice law in the State of California and before this  
3 Court, and am counsel of record for Defendants VITAL PHARMACEUTICAL, INC. d/b/a  
4 VPX SPORTS (“VPX”) in the above-captioned matter. I make this declaration in support of  
5 VPX’s Motion for Relief from Nondispositive Pretrial Order of Magistrate Judge pursuant to Rule  
6 72(a) of the Federal Rules of Civil Procedure and Civil L.R. 72-2, and VPX’s objections to the  
7 Honorable Robert M. Illman United States Magistrate Judge’s order dated November 8, 2019  
8 (ECF No. 82), and in support of VPX’s request for an order denying Plaintiffs’ motion to compel  
9 production of documents responsive to request No. 30 because it requires production of VPX’s  
10 complete and un-redacted confidential trade secret formula for the BANG® energy drink product.  
11 The following facts are personally known to me, and if called as a witness I could, and would,  
12 testify competently thereto.

13 2. Defendant VPX objects to the following entry in paragraph no. 1 of the November  
14 8, 2019 Order:

15 1. Defendant is ordered within 21 days of entry of this order to provide  
16 Plaintiffs with documents concerning the formulations of the Bang energy drinks  
in response to Plaintiffs’ Request for Production No. 30.

17 3. A separate lawsuit involving VPX and Monster Energy Company is pending in  
18 the Central District of California. *Monster Energy Company v. Vital Pharmaceuticals, Inc., et*  
19 *al.* (Central District of California, Case No. 18-cv-1882 JGB (SHKx)) (“*Monster*”).

20 4. Attached hereto as **Exhibit A** is a true and correct copy of the “Declaration of  
21 Marc Kesten in support of Defendant Vital Pharmaceuticals, Inc.’s Opposition to Monster  
22 Energy Company’s Discovery Dispute Letter Moving To Compel Production of Trade Secret  
23 BANG Formulas” from the *Monster* case with ECF No. 132-2.

- 24 • Attached as Exhibit A to Mr. Kesten’s Declaration is the Complaint from a separate  
25 lawsuit pending in the Southern District of Florida, alleging Monster’s REIGN  
26 product’s packaging design infringes the trade dress of VPX’s BANG® product. *Vital*  
27 *Pharmaceuticals, Inc. v. Monster Beverage Corporation, et al.*, Case No. 0:19-cv-  
28 60809-UU.

Gordon Rees Scully Mansukhani, LLP  
2211 Michelson Drive, Suite 400  
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- Attached as Exhibit B to Mr. Kesten's Declaration is the Complaint from a separate lawsuit pending in the Southern District of Florida, asserting causes of action for false advertising and unfair competition against Monster. *Vital Pharmaceuticals, Inc. v. Monster Beverage Corporation, et al.*, Case No. 0:19-cv-61974-RS.

5. Attached hereto as **Exhibit B** is a true and correct copy of the "Declaration of Dr. Liangxi Li in support of Defendant Vital Pharmaceuticals, Inc.'s Opposition to Monster Energy Company's Discovery Dispute Letter Moving To Compel Production of Trade Secret BANG Formulas" from the *Monster* case with ECF No. 132-1.

6. Attached hereto as **Exhibit C** is a true and correct copy the "Order GRANTING Defendants' motion to disqualify Marc P. Miles and Shook, Hardy & Bacon L.L.P. and DENYING Defendants' motion for monetary sanctions (Dkt. No. 15)" from the *Monster* case with ECF No. 31.

7. Attached hereto as **Exhibit D** is a true and correct copy of Order VPX's motion to disqualify Monster's counsel Marc P. Miles and Shook, Hardy & Bacon L.L.P. in the *Monster* case (ECF No. 15), with the caption "Defendants Vital Pharmaceuticals, Inc. and John H. Owoc's Notice of Motion and Motion (1) to Disqualify Counsel, (2) For Stay Pending Resolution of Disqualification Issue, and (3) For Monetary Sanctions." Also contained within Exhibit D are excerpts of documents filed in support, including a press release (ECF 15-5) that contains the following statement, which is highlighted in yellow on page 39 of this Exhibit D:

"I am amazed at the lengths some companies will go to make a buck," said Marc P. Miles of Shook, Hardy & Bacon, counsel for Monster, in a statement. "I imagine this lawsuit is just the tip of the iceberg for Bang. I would not be surprised if the (U.S. Food and Drug Administration) took action or if there are consumer class action lawsuits for false advertising. ..."

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction this service was made.

Executed on November 22, 2019 at San Mateo, California.

/s/ Michael D. Kanach

Michael D. Kanach